## Before the

## FEDERAL COMMUNICATIONS COMMISSION

JUN 1 8 1996

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Washington, D.C. 20554

FEDERAL COLLEGISTRATIONS COMMISSION

In the Matter of

Amendment of Section 73.202(b)

Table of Allotments

FM Broadcast Stations
(Rosendale, New York)

)

MM Docket 93-17

RM-8170

To: Chief, Allocations Branch Policy and Rules Division

Mass Media Bureau

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## MOTION TO ACCEPT OPPOSITION TO APPLICATION FOR REVIEW

Sacred Heart University, Inc. ("SHU"), by its counsel, seeks leave to file late comments in this proceeding in response to the Application for Review filed on April 23, 1996, by State University of New York ("SUNY"). SHU is an applicant for Channel 273A at Rosendale (BPED-960111AZ). In addition, SHU has been a party to this proceeding since April 12, 1993, the original comment deadline.

1. As a party to this proceeding, SHU was served with a copy of the Application for Review as indicated in SUNY's Certificate of

No. of Copies rec'd OT 4

SHU is aware of several other filings that have been made by other parties since the filing of the Application for Review. SHU will not take this opportunity to comment on the other filings.

Service. Unfortunately, SUNY served SHU at a previous address. When SUNY discovered this problem, it transmitted a copy of the Application for Review to SHU's counsel by facsimile on May 3, 1996, ten days after filing the Application for Review. At this late date, SHU decided that rather than try to hurriedly file comments, it would wait for a Public Notice which would establish a comment period for the public to file comments. The Public Notice would have been particularly valuable in this proceeding because there are ten applicants for Channel 273A at Rosendale. Each of these applicants would be affected by the decision reached in the Application for Review. Yet, only two of the applicants were served.

2. For many years, the Commission's practice has been to issue a Public Notice of the filing of an Application for Review. The Public Notices cited Section 1.429(e) as the guiding rule provision. Although that rule section specifically pertains to petitions for reconsideration and despite the fact that there is no comparable provision in Section 1.115 of the Commission's Rules for Applications for Review, the Commission has consistently notified the general public of such filings. Thus, interested persons who were not parties to the proceeding but who may have developed a subsequent interest due to the filing of an application for a new FM channel, for example, came to depend on the Public Notice to determine whether the Commission's action was final. To our knowledge, the Commission has not informed the public that it is no

longer issuing Public Notices when Applications for Review are filed.

- Since the Commission receives only a few Applications for Review per year, undersigned counsel had not noticed that the Commission has stopped its practice of issuing Public Notices. Gardner v. FCC, 530 F2d 1086 (D.C. Cir. 1976), the U.S. Court of Appeals stated that "...apart from the Administrative Procedure Act, we hold that the failure to give notice is also objectionable as a violation of established procedures, publicly announced by the Commission itself.... Once having stated that it will give such notice, the Commission has created a reasonable expectation in the parties to the proceeding that such notice will be received. it may not be the safest practice, there appears no compelling reason why a party ought not to rely on this assurance of notice as his sole means of learning that his case has been decided. having created this expectation, the Commission ought not to be heard to say that its own rule does not create a legal burden of giving notice." Gardner v. FCC, supra, at 1089-90.
- 4. Indeed, the Commission's longstanding past practice has been to consistently issue Public Notices based on its interpretation that Section 1.429(e) requires such Public Notice. This practice has created a reasonable expectation that a Public Notice would be issued to set a comment filing deadline. SHU does not argue that Commission rules require that the Commission issue a Public Notice whenever an Application for Review is filed.

Rather, having established a consistent practice over many years, the Commission must tell the public that it has discontinued the practice. The failure to notify the public of this deviation from past practice should entitle SHU to offer comments for consideration on a late filed basis.

- 5. The purpose of these joint comments is primarily to have the Commission consider the pleading that SHU filed earlier in this proceeding entitled "Opposition to Petition for Reconsideration" filed January 11, 1996, as its opposition to the Application for Review. In addition, SHU wishes to comment on one new matter raised by SUNY for the first time in its Application for Review.
- 6. Accordingly, SHU requests that the Commission consider the separately filed "Opposition to Application for Review."

Respectfully submitted,

SACRED HEART UNIVERSITY, INC.

By:

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Its Counsel

June 18, 1996

## CERTIFICATE OF SERVICE

- I, Veronica Abarre, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., hereby certify that I have, on this 18th day of June, 1996, sent by first-class U.S. Mail, postage prepaid, copies of the foregoing "MOTION TO ACCEPT OPPOSITION TO APPLICATION FOR REVIEW" to the following:
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